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IN THE

Supreme Court of the United States

October Term, 1960.

No. 2[illegible]

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, District Director of Internal Revenue, Philadelphia,
Respondent,

and

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

and

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No.

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, PHILADELPHIA,
Respondent,

AND

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
Respondent,

AND

SEABOARD SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The Opinion of the Court of Appeals in the present case has not yet been reported, and is printed in the Appendix hereto. The Opinion of the District Court is reported at 179 F. Supp. 578 (E. D. Pa. 1960). It is also contained in pages 16a-24a of the appendix record as printed for the use of the Court of Appeals, of which nine (9) copies are filed herewith, under the provisions of Rule 21.

The opinions of the District Court and Court of Appeals in the related case of *Pennsylvania Turnpike Commission v. McGinnes* are reported at 169 F. Supp. 580 and 268 F. 2d 65, respectively. This Court denied the petition for a writ of certiorari in that case at 361 U. S. 829.

JURISDICTION.

The judgment of the Court of Appeals is dated and was entered on May 24, 1960. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Does a United States District Court have jurisdiction of an action removed from a state court under 28 U. S. C. § 1442 by respondent, District Director of Internal Revenue, wherein petitioner, Pennsylvania Turnpike Commission, an agency of the Commonwealth of Pennsylvania, seeks to enjoin the District Director from refunding to respondent, Manu-Mine Research and Development Company, or its assignee, respondent, Seaboard Surety Company, over $900,000 fraudulently obtained from petitioner by Manu-Mine, and used by Manu-Mine to pay its 1955 income tax, where Manu-Mine has applied for a refund of the tax, and wherein petitioner also seeks an order directing payment of any such refund determined to be due, to petitioner as rightful owner of the fund?

STATUTES INVOLVED.

The case involves § 1442(a) of the Judicial Code of the United States, which provides that: "A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue . . . ." Act of June 25, 1948, c. 646, 62 Stat. 938, 28 U. S. C. Section 1442(a)(1).

STATEMENT OF THE CASE.

Petitioner, Pennsylvania Turnpike Commission, brought this suit in a Pennsylvania state court to enjoin the District Director of Internal Revenue in Philadelphia from paying to respondent, Manu-Mine Research and Development Company, or its assignee, respondent, Seaboard Surety Company, a tax refund of about $900,000 derived from funds possession of which is alleged to have been fraudulently obtained by Manu-Mine from petitioner. The complaint alleged that in 1956 Manu-Mine paid more than $1,000,000 on its 1955 federal income tax, using for that purpose money obtained by fraud from petitioner, and that the funds so paid were and are petitioner's property and did not belong and have not rightfully belonged to Manu-Mine. The tax payment was made to defendant McGinnes, District Director of Internal Revenue in Philadelphia. Thereafter Manu-Mine or its assignee, Seaboard, applied to McGinnes for a refund of such tax payment in the amount of about $900,000. McGinnes was about to allow the claim for refund and to direct its payment to

Manu-Mine or Seaboard. Petitioner notified McGinnes of its claim to the fund but despite the notification, McGinnes refused to recognize petitioner's claim and refused to withhold payment of the fund pending determination of petitioner's claim.

The prayer for relief sought an injunction restraining McGinnes from making the refund payment to Manu-Mine or Seaboard and an order, directing him to pay over the fund to petitioner, upon a determination that it belonged to petitioner.

The District Director removed the case to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U. S. C. § 1442(a)(1), and filed an answer on the merits denying liability. Manu-Mine and Seaboard moved to dismiss for lack of jurisdiction. The District Court granted their motions, on the ground that the state court, where the action originated, had no power to enjoin a federal officer in a matter involving his official duties, even though only ministerial and not discretionary action was sought to be enjoined, and that, accordingly, the federal court could acquire no jurisdiction on removal. The Court of Appeals affirmed in a brief opinion, adopting the reasoning of the district court. Before the Court of Appeals, the District Director joined in the positions of Manu-Mine and Seaboard.

Petitioner had originally filed an action seeking the same relief in the United States District Court, but the Court of Appeals held that there was no original federal jurisdiction and accordingly that action was dismissed. *Pennsylvania Turnpike Commission v. McGinnes*, 268 F. 2d 65 (3d Cir. 1959). This Court denied certiorari. 361 U. S. 829. That decision left open the question of state court jurisdiction.

REASONS FOR ALLOWING THE WRIT.

This case involves the rights of petitioner, the victim of a fraud, to recover a tax refund applied for by the defrauding wrongdoer, who paid a federal income tax on the fraudulently obtained funds with the fraudulently obtained funds. Petitioner seeks to prevent the refund from being returned to the wrongdoer. The right to refund arises from a loss carryback available to the wrongdoer from a later year, but the only money that can be returned by way of refund is that of petitioner, since that was the only money paid by the wrongdoer to the District Director in the first instance. The case has great public importance in that the defrauded party is a governmental instrumentality of the Commonwealth of Pennsylvania. Criminal convictions of Manu-Mine's president and general manager have been affirmed by the Pennsylvania Supreme Court. *Commonwealth v. Evans*, 399 Pa. 387 (1960).

In *Commissioner of Internal Revenue v. Wilcox*, 327 U. S. 404 (1946) and *Rutkin v. United States*, 343 U. S. 130 (1952), this Court considered the taxability to the wrongdoer of money obtained by embezzlement and extortion, and recently again granted certiorari on the issue of the taxability of embezzled funds. *James v. United States*, October Term, 1959, No. 820, cert. granted May 16, 1960. In none of these cases was the claim of the victim for recovery of the funds at issue, as it is here, although the majority opinion in *Wilcox* and the dissenting opinion in *Rutkin* indicate a sensitivity to the problem.

Learning that the District Director was about to make a quick administrative refund to Manu-Mine, petitioner originally brought suit to prevent it in the United States District Court, and that suit, as noted above, was dismissed, for lack of original federal jurisdiction. This suit was then filed in the state court and removed by the District Director.

If that avenue also is to remain closed to petitioner, as it has been by the decisions of the District Court and Court of Appeals, then petitioner has no recourse to prevent the refund from returning straight into the hands of the defrauder.

Petitioner submits that the result reached by the District Court and Court of Appeals are incorrect, and cannot be squared with the decisions of this Court in *Houston v. Ormes*, 252 U. S. 469 (1920) and *Brooks v. Dewar*, 313 U. S. 354 (1941). *Houston v. Ormes* was a suit to impress an equitable lien on a fund in the hands of the Secretary of the Treasury for payment to another, against whom plaintiff had the right to the equitable lien. It was brought in the District Court of the District of Columbia, but, as this Court characterized it, it was an equitable action, and not a mandamus action. The plaintiff's right to maintain the action was sustained.

The relief sought in that case closely parallels the relief sought here, where petitioner seeks to impress an equitable lien on a tax refund, only upon a determination that such refund is to be paid, and does not seek to compel the exercise of any discretionary action. Meanwhile, an injunction is sought to prevent payment of the refund to the wrongdoer, pending the determination of petitioner's rights. As pointed out in *Houston v. Ormes*, this is not a suit against the United States, since it seeks to affect only the ministerial duty of payment, after the refund has been allowed, and to maintain the status quo meanwhile.

The Court of Appeals in the first action, distinguishing *Houston v. Ormes*, advanced there by petitioner as a basis for sustaining federal jurisdiction, had this to say: "As the Supreme Court recognized, the generally equitable jurisdiction of the District Court of the District of Columbia, analogous to the equitable jurisdiction of a state court, was invoked. Here in Pennsylvania it is the state courts and not any federal court which exercise such jurisdiction." *Pennsylvania Turnpike Commission v. McGinnes*, 268 F. 2d

65, 68 (3d Cir. 1959). Now the Court of Appeals has rejected state court jurisdiction as well.

This result has been reached on the doctrinal ground that a state court has no jurisdiction to enjoin a federal officer, even in a purely ministerial matter. In that respect, it conflicts with *Brooks v. Dewar*, 313 U. S. 354 (1941), where this Court expressly held that a state court has equitable jurisdiction to enjoin a federal officer but proceeded to deny recovery on the merits. This is distinct from the mandamus cases, where both federal and state jurisdiction have been denied. *McClung v. Silliman*, 6 Wheat. 598 (1821).

The federal government preserves ample protection against state interference in two ways. First, if essential interests of the United States are involved, both state and federal jurisdiction will be denied, on the ground that the United States has not consented to suit. Secondly, as Professor Moore has pointed out, in arguing in favor of state court jurisdiction to enjoin federal officers, the federal government is protected by the broad right of removal given to its officers. 1 *Moore's Federal Practice*, Para. 0.6(5), p. 247. Here, the United States is not an indispensable party or the real party in interest and removal has been effected by the District Director. The apprehension of state interference with federal functions, expressed by the district judge here as the underlying basis for his decision, is therefore not realistic. *Brooks v. Dewar*, which sustains jurisdiction, has never been overruled.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,169

PENNSYLVANIA TURNPIKE COMMISSION,
Appellant

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE OF PHILADELPHIA, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY AND SEABOARD SURETY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued May 13, 1960

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed May 24, 1960)

PER CURIAM

This is an appeal from an order of the District Court for the Eastern District of Pennsylvania dismissing the complaint of the Pennsylvania Turnpike Commission against the District Director of Internal Revenue for lack of jurisdiction and remanding the case against the other de-

fendants to the state courts. It is the second time the case has been in this Court. In the first case we held that the United States District Court did not have original jurisdiction of the action. *Pennsylvania Turnpike Commission v. McGinnes*, 268 F. 2d 65 (3d Cir.), *cert. denied* 361 U. S. 829 (1959). Then the plaintiff started an action in the Common Pleas Court of Philadelphia County, and the District Director removed it to the federal district court for the Eastern District of Pennsylvania under 28 U. S. C. A. 1442 (a)(1). The complaint seeks an injunction against the District Director of Internal Revenue or his successors restraining payment of a tax refund to Manu-Mine Research & Development Company or its assignee, Seaboard Surety Company, and certain injunctive relief against the two companies. We were advised upon argument that this tax refund has not yet been allowed through the formal channels necessary in the Bureau of Internal Revenue.

The district judge dismissed the complaint against the District Director for lack of jurisdiction and remanded the case against the other defendants to the state courts. He made a complete analysis of the problem and discussed the authorities. He was mindful of the difference alleged to be presented between this suit and the former one, already referred to. He also pointed out that the plaintiff was not without remedy against the other defendants in the state courts of Pennsylvania. 179 F. Supp. 578 (E. D. Pa. 1959).

We agree with the result reached by Judge Clary and think that progress of the case will be assisted by the prompt expression of that agreement rather than postponing what we have to say until a more formal opinion can be written.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,169.

PENNSYLVANIA TURNPIKE COMMISSION,
Appellant,

v.

EDGAR A. McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE OF PHILADELPHIA, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY AND SEABOARD SURETY COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs to Manu-Mine Research and Development Company and Seaboard Surety Company.

Attest:

IDA O. CRESKOFF,
Clerk.

May 24, 1960

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Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 201.

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner,

v.

EDGAR A. McGINNES, District Director of Internal Revenue, Philadelphia,
and
Respondent,

MANU-MINE RESEARCH & DEVELOPMENT COMPANY,
and
Respondent,

SEABOARD SURETY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTIONS PRESENTED FOR REVIEW.

1. Does the District Court have jurisdiction of an action removed from a State Court, if the State Court did not have jurisdiction over the subject matter of the action?

2. Does a State Court have jurisdiction of an action to enjoin a District Director of Internal Revenue from paying a tax refund to a taxpayer, and to direct the payment of the tax refund to a Third Party who claims to be the equitable owner of the proceeds of the refund?

3. Is the United States an indispensable party to such an action?

ARGUMENT.

Petitioner claims that Respondent Manu-Mine Research and Development Co. ("Manu-Mine") obtained money from it by fraud, used the money to pay Manu-Mine's federal income taxes and is now seeking a refund of those tax moneys which it has assigned to Respondent Seaboard Surety Company ("Seaboard"). Petitioner says that it, and not Manu-Mine or Seaboard, is entitled to the tax refund. The substantive questions suggested by this brief recital of the claim are all questions of state law involving only Petitioner, Manu-Mine and Seaboard. Thus, when Petitioner asserted these claims in an action commenced in the district court, the action was dismissed for lack of federal jurisdiction; *Pennsylvania Turnpike Commission v. McGinnes, et al.*, 169 F. Supp. 580 (E. D. Pa. 1958), *aff'd* 268 F. 2d 65 (3rd Cir., 1959), *cert. den.*, 361 U. S. 829 (1959).

Petitioner started this second suit on the same claim in the Common Pleas Court of Philadelphia County and the District Director removed it to the district court. The Complaint asks (a) for an injunction against the District Director enjoining him from paying the tax refund to Manu-Mine, (b) for an injunction against Manu-Mine enjoining it from attempting to cause the payment to be made to Seaboard, the assignee, and (c) for an order directing the District Director to pay the refund to the Petitioner.

It is the position of these Respondents, sustained by the Courts below, that the state court had no jurisdiction over the action against the District Director and that the district court therefore acquired no jurisdiction on removal. The following propositions, which support this conclusion, have all been upheld by decisions of this Court, and no new or unsettled question of federal law is presented by the Petition warranting review by this Court:

1. If a state court lacks jurisdiction of the subject matter or of the parties, the district court acquires none on removal: *Lambert Run Coal Co. v. Baltimore and Ohio Railroad Co.*, 258 U. S. 377, 66 L. Ed. 671 (1922).

2. Since Petitioner is in no way involved in the tax refund, it is really seeking to attach a debt due by the United States to Manu-Mine, and this cannot be done: *Buchanan v. Alexander*, 4 How. 20 (1846).

3. Actions to enjoin a federal officer may not be maintained except where: (1) the statute under which he purports to act is unconstitutional; or (2) where the officer is acting *ultra vires* his authority; *Larson v. Domestic and Foreign Corp.*, 337 U. S. 682, 93 L. Ed. 1628 (1948). Neither of these situations is presented by the present case. Petitioner relies on *Brooks v. Dewar*, 313 U. S. 354, 85 L. Ed. 1399 (1941), but in that case this Court based its decision on a failure of the complaint to state a cause of action and expressly declined to resolve the jurisdictional question "touching issues of so grave consequence". The *Larson* case, *supra*, did resolve the conflicts in this area and established the foregoing two situations as the only ones in which an injunctive action may be maintained against a federal official purporting to act in the performance of his official duties.

4. Petitioner seeks a direction to the District Director to pay the refund to it. This would constitute relief in the nature of mandamus against a federal official, and a state court has no such jurisdiction: *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340 (1821).

5. The state court had no power to interfere with McGinnes in the performance of his official duties; *U. S. v. Tarble*, 13 Wall. 397, 20 L. Ed. 597 (1872); and *Keely v. Sanders*, 99 U. S. 441 (1879).

6. The United States is an indispensable party because the action is one to reach money owed by the United States and because its liability cannot be tried behind its back; *Mine Safety Appliance Co. v. Forrestal*, 326 U. S. 371 (1945). Further, any injunction against payment of the refund would result in the imposition on the United States of an obligation to pay interest under Section 6611 of the Internal Revenue Code.

Petitioner relies on *Houston v. Ormes*, 252 U. S. 469, 64 L. Ed. 667 (1920). That was an action originated in the federal court for the District of Columbia by an attorney who sought to establish an equitable lien for a fee on a fund created by Congress to pay the client's claim, and to require the Secretary of the Treasury to pay the fund to a receiver for the client. This was a *federal* court exercising mandamus powers over a federal official who had only a ministerial act to perform. That federal court is the only *federal* court which possesses those general equitable powers. There is no suggestion in the case that a *state* court has any such power *over a federal official*, and the foregoing principles and decisions indicate clearly that it does not.

Since this action involves no unsettled questions of law, and was properly decided below in consonance with the proper purview of federal and state sovereignties, the Petition for Certiorari should be denied.

Respectfully submitted,

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FILED
AUG 5 1960
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No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1960

PENNSYLVANIA TURNPIKE COMMISSION, PETITIONER

v.

EDGAR A. MCGINNES, District Director of Internal Revenue, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY, and SEABOARD SURETY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE DISTRICT DIRECTOR OF INTERNAL REVENUE IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 201

PENNSYLVANIA TURNPIKE COMMISSION, PETITIONER

v.

EDGAR A. MCGINNES, District Director of Internal Revenue, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY, and SEABOARD SURETY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE DISTRICT DIRECTOR OF INTERNAL REVENUE IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 16a-24a) is reported at 179 F. Supp. 578. The opinion of the court of appeals (Pet. 1a-2a) is reported at 278 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1960 (Pet. 3a). The petition for a writ

of certiorari was filed on June 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's action to compel the performance of a ministerial duty by the District Director of Internal Revenue is premature, since the Director does not have such a duty at this time.

2. Whether a federal court, upon removal of a cause from a state court, has jurisdiction to enjoin the Director, a federal officer, from taking official action within the scope of his statutory power and to direct the manner in which the functions of his office shall be performed.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.
>
> (a) *General Rule.*—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.
>
> * * * *

STATEMENT

This action was brought by petitioner to enjoin the District Director of Internal Revenue, Philadelphia,

from making payment on a tax refund claim to respondent Manu-Mine Research & Development Company, and to require the Director to pay any amounts due under that claim to petitioner upon a determination that the latter has an equitable interest in the claim (R. 2a-4a). Petitioner also seeks an injunction prohibiting Manu-Mine from attempting to create any rights to the refund claim in respondent Seaboard Surety Company (R. 4a). Pursuant to motions by respondents Manu-Mine and Seaboard, the district court dismissed the case as to the Director and remanded petitioner's claim against the other two parties to the state court from which this action had been removed (R. 16a-25a). The court of appeals affirmed (Pet. 1a-2a). The relevant facts are as follows:

In 1956, Manu-Mine paid more than $1,000,000 in income taxes to the Director for its 1955 taxable year (R. 2a). Petitioner alleges in its complaint (R. 2a-3a) that Manu-Mine had previously obtained this money from it by fraud. The following year Manu-Mine purported to assign to Seaboard any interest it had in the 1955 taxes and, thereafter, applied to the Director for a refund, based upon a carry-back loss, of approximately $900,000 for that year (R. 3a).

Petitioner brought an action against Manu-Mine in a Pennsylvania court for the allegedly fraudulent acquisition by the latter of the funds with which it paid its 1955 taxes (R. 16a). The Supreme Court of Pennsylvania upheld a preliminary injunction

freezing the assets of Manu-Mine (*Pennsylvania Turnpike Commission* v. *Evans*, 392 Pa. 110, 139 A. 2d 530), and that suit is still pending on the merits.

Petitioner then instituted an original action in the federal district court, seeking the same relief sought here. The district court denied defendants' motions to dismiss, but the court of appeals reversed, holding that there was no federal jurisdiction. *Pennsylvania Turnpike Commission* v. *McGinnes*, 169 F. Supp. 580 (E.D. Pa.), reversed, 268 F. 2d 65 (C.A. 3), certiorari denied, 361 U.S. 829. Petitioner thereupon filed this action in the Pennsylvania state court (R. 16a). Apart from the difference in the forums in which they originated, this suit is identical in all respects to the prior action brought in the district court. The Director removed the case to the district court under 28 U.S.C. 1442(a)(1) (R. 6a-7a). The district court dismissed the case as to the Director and remanded the action against the remaining defendants to the state court from which it had been removed (R. 25a). The court of appeals affirmed.

ARGUMENT

1. Petitioner seeks in this action to enjoin the Director from making refund payments to Manu-Mine and to direct him to pay petitioner instead. While the Director is the nominal defendant here, the relief requested would control the administration of his federal office, and, consequently, this action cannot be brought without the consent of the United States. *Larson* v. *Domestic & Foreign Corp.*, 337

U.S. 682; *Land* v. *Dollar*, 330 U.S. 731, 738. In apparent recognition of that defect, petitioner contends that this action merely seeks to control the ministerial duty of the Director to make payment "after the refund has been allowed" and, therefore, is not a suit against the United States (Pet. 6). In fact, however, since the claim for refund has not been acted upon, the Director has no present duty to make payment. Thus petitioner seeks now to enjoin the Director from failing to comply with an administrative duty which may or may not arise at some future date. If suits could be maintained against Government officials on the mere speculation of future occurrences, it would soon constitute an intolerable burden upon the public administration. The Government would be subjected to endless litigation by creditors of individuals who had potential claims against it. Petitioner fails to cite any case in which a suit of this kind has been maintained,* and we also have been unable to find any authority for it. To the contrary, every suit of this kind that we located involved an already existing ministerial duty. *E.g.*, *Houston* v. *Ormes*, 252 U.S. 469; *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121, and *Doerschuck* v. *Mellon*, 55 F. 2d 741 (C.A. D.C.). Accordingly, petitioner's action, as one premised upon the power to enforce performance of a ministerial duty, is premature.

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* In *Houston* v. *Ormes*, 252 U.S. 469, 472-473, upon which petitioner relies (Pet. 6), it was conceded that the Secretary of Treasury had a then-existing ministerial duty which was the subject of the litigation.

2. An additional ground supporting the decision below is that a state court lacks jurisdiction to control the performance by a federal officer of his official duties. Since this action was removed from a state court, the jurisdiction of the district court is derived from and coincides with that of the state court. *Lambert Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382; *Minnesota* v. *United States*, 305 U.S. 382, 389.

It is axiomatic that a state court lacks power to control a federal officer in the exercise of his official functions. *McClung* v. *Silliman*, 6 Wheat., 598. See also, *Tarble's Case*, 13 Wall. 397, *Ableman* v. *Booth*, 21 How. 506; *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *Kendall* v. *United States*, 12 Pet. 524, 617; *In re Blake*, 175 U.S. 114, 119. As this Court held in *McClung*, under the federal system, a federal officer may be controlled only by the federal Government and, therefore, a state court cannot interfere with the performance of his work. The decision of this Court in *Brooks* v. *Dewar*, 313 U.S. 354, does not, as petitioner asserts (Pet. 7), conflict with the above-mentioned principle. Although that case did present, *inter alia*, the question whether a state court could enjoin a federal officer, this Court expressly refrained from passing on that and other jurisdictional issues because the plaintiff's bill was so clearly defective on the merits.

3. The petitioner has already brought an action against Manu-Mine in a Pennsylvania court and obtained a preliminary injunction freezing the latter's assets. See *Pennsylvania Turnpike Commission* v.

Evans, 392 Pa. 110, 139 A. 2d 530. As both courts below noted, if that order does not provide sufficient protection, petitioner can undoubtedly obtain whatever additional relief it needs against Manu-Mine from the state court (Pet. 2a). Since the appropriate remedy for petitioner is in its action against Manu-Mine, this cause is of neither immediate nor recurring importance. And, as noted above, the decision below is not in conflict with the decision of any appellate court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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